Lim Tai Ming & Sons Credit Sdn Bhd v Lim Tuck Thien

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO A–02–770 OF 1998
SITI NORMA YAAKOB, DENIS ONG AND HAIDAR JJCA
22 AUGUST 2000

Companies and Corporations *— Receivership — Appointment of receivers and managers — Plaintiff removed as director — Plaintiff not a shareholder — Whether plaintiff had locus standi to seek appointment of receiver and manager — — Whether court should grant damages for interim period between ex parte order for appointment of receiver up to disposal of case — Evidence — Standard of proof — Forgery — Signature on share transfer form — Whether plaintiff to show on balance of probabilities that signature was not his — Suspicious circumstances of execution of form —þWhether forgery proved*

The defendant company was a second hand car dealer family company founded by the plaintiff's father. The plaintiff held 355,000 shares ('the shares') in the company and was a director of the company. The plaintiff brought action against the company alleging that the shares had been transferred to his father through the forgery of the share transfer form (D4) and that he had been improperly removed as a director of the company. The High Court judge found that the plaintiff did not sign D4 in favour of his father and D4 was a forgery and thus declared the plaintiff as the shareholder of the shares. However, the judge held that the defendant company had properly and lawfully removed the plaintiff as a director at the company's extraordinary general meeting. The defendant company appealed and the plaintiff cross-appealed.

Held, allowing the appeal with costs and dismissing the cross-appeal with costs:

(1) The judge did not misdirect himself on the standard of proof in relation to the alleged forgery of D4 on the facts of the case before him. What the plaintiff needed to show is that the signature alleged to be his in D4 is not, on a balance of probabilities, his signature (see p 63F).

(2) The judge failed to properly evaluate the opinion of the expert witness regarding the alleged forgery and drew a number of inferences to show suspicious circumstances of the execution of D4 without fully appreciating all the evidence before him. The suspicious circumstances of the allegation of forgery were more against the plaintiff than the defendant company and the judge failed to adequately give due weight and consideration to them when ruling that the plaintiff had on a balance of probabilities proved the forgery of D4 (see p 68C–D).

(3) The court accepted the judge's finding of fact that the plaintiff's address was the same in all his previous correspondence and thus the plaintiff's contention that he had not received the relevant notices was rightly rejected (see p 70G).

(4) In view of the court's decision that D4 was not forged and therefore the transfer of the shares to his father was valid, it follows therefore that the plaintiff was no longer a shareholder of the defendant company at the time the action was filed by him. The plaintiff was also validly removed as a director of the defendant company. In view of his change of status as being neither a shareholder nor a director, it follows therefore that he had no locus standi to seek the appointment of a receiver and manager for the defendant company and for an order of a mareva injunction (see pp 70I–71A).

(5) The judge erred in not making an ancillary order for damages between the interim period that the ex parte order was given to the plaintiff for the appointment of a receiver and manager and for a mareva injunction order up to the disposal of the suit. There was an undertaking as to damages by the plaintiff at the time of the application for the ex parte order (see p 71C).

[**Bahasa Malaysia summary**

Syarikat defendan adalah syarikat keluarga yang menjalankan perniagaan kereta terpakai yang diasaskan oleh bapa plaintif. Plaintif telah memegang 355,000 saham-saham ('saham-saham tersebut') di dalam syarikat dan juga adalah pengarah syarikat tersebut. Plaintif telah membawa tindakan terhadap syarikat tersebut dengan mengatakan bahawa saham-saham telah dipindahkan kepada bapanya melalui pemalsuan borang pemindahan saham (D4) dan beliau telah disingkirkan sebagai pengarah syarikat secara salah. Mahkamah Tinggi mendapati bahawa plaintif tidak menandatangani D4 yang memihak kepada bapanya dan D4 adalah suatu pemalsuan dan dengan itu mengisytiharkan plaintif sebagai pemegang saham-saham tersebut. Namun, hakim mendapati syarikat defendan telah dengan betul dan sah menyingkirkan plaintif sebagai pengarah semasa mesyuarat khas syarikat tersebut. Syarikat defendan telah merayu dan plaintif telah membuat rayuan-balas.

Diputuskan, membenarkan rayuan tersebut dengan kos dan menolak rayuan balas dengan kos:

(1) Hakim tidak tersalah arah berkenaan dengan tahap pembuktian pengataan pemalsuan D4 di atas fakta di hadapannya. Apa yang plaintif perlu menunjukkan adalah bahawa tandatangan yang dikatakan kepunyaannya di dalam D4 bukanlah, di atas imbangan kebarangkalian, tandatangannya (lihat ms 63F).

(2) Hakim telah gagal untuk menilai secara betul pendapat saksi pakar berkenaan dengan pengataan pemalsuan dan mencapai beberapa inferens untuk menunjukkan keadaan-keadaan mencurigakan berkenaan pelaksanaan D4 tanpa menghargai sepenuhnya semua keterangan di hadapannya. Keadaan-keadaan yang mencurigakan berkenaan pengataan pemalsuan adalah lebih menentang plaintif daripada syarikat defendan dan hakim gagal untuk memberikan penekanan dan pertimbangan yang secukupnya kepada mereka apabila memutuskan bahawa plaintif telah di atas imbangan kebarangkalian membuktikan pemalsuan D4 (lihat ms 68C-D).

(3) Mahkamah menerima penemuan fakta hakim bahawa alamat plaintif adalah sama di dalam surat-surat terdahulu dan dengan itu penegasan plaintif bahawa beliau tidak menerima notis-notis yang relevan telah ditolak dengan betul (lihat ms 70G).

(4) Memandangkan keputusan mahkamah bahawa D4 tidaklah dipalsukan dan dengan itu pemindahan saham-saham kepada bapanya adalah sah, maka plantif bukan lagi pemegang saham syarikat defendan pada masa tindakan tersebut difailkan olehnya. Plaintif juga telah disingkirkan secara sah sebagai pengarah syarikat defendan. Memandangkan perubahan statusnya sebagai bukan pemegang saham dan pengarah, maka beliau tiada locus standi untuk memohon perlantikan penerima dan pengurus untuk defendan syarikat dan suatu perintah injunksi mareva (lihat ms 70I–71A).

(5) Hakim telah silap di dalam tidak membuat perintah sampingan untuk ganti rugi antara tempoh sementara semasa perintah ex parte diberikan kepada plaintif untuk perlantikan penerima dan pengurus dan injunksi mareva hingga kepada penyelesaian guaman tersebut. Terdapat akujanji berkenaan dengan ganti rugi oleh plaintif pada masa permohonan perintah ex parte tersebut (lihat ms 71C).]

Notes

For cases on receivership generally, see 3(1) *Malall's Digest* (4th Ed, 2000 Reissue) paras 464–530.

For cases on standard of proof generally, see 7 *Malall's Digest* (4th Ed, 1998 Reissue) paras 1824–1826.

Cases referred to

Ang Hiok Seng v Yim Yut Kiu [1997] 2 MLJ 45 (refd)

Boonsom Boonyanit @ Sun Yok Eng v Adorna Properties Sdn Bhd [1997] 2 MLJ 62 (refd)

Choo Kok Beng v Choo Kok Hoe & Ors [1984] 2 MLJ 165 (refd)

Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor [1992] 1 MLJ 697 (refd)

Doe D Devine v Wilson (1855)14 ER 581 (refd)
Goh Ah Yew v PP [1949] MLJ 150 (refd)
Ikebife Ibeneweka & Ors v Peter Egbuna & Anor [1964] 1 WLR 219 (refd)
Onassis & Calogeropoulos v Vergottis [1968] 2 Lloyd's Rep 403 (refd)
PP v Mohamed Kassim bin Yatim [1977] 1 MLJ 64 (refd)
Robert Tan & Ors v Tommy Tan & Anor [1984] 1 MLJ 230 (refd)
United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd [1993] 1 MLJ 182 (refd)

Legislation referred to

Companies Act 1965 s 125(2)
Evidence Act 1950 ss 45, 46

Appeal from: Civil Suit No 22–125 of 1994 (High Court, Ipoh)

Vijaya Segaran (*Paul Subramaniam* with him) (*Maxwell Kenin Cowdy & Jones*) for the appellant.
Gurbachan Singh (*Bachan & Kartar*) for the respondents.

Haidar JCA. (delivering judgment of the court): In the court below, the plaintiff prays for a number of orders against the defendant company vide Writ Action No 22–125–94. The action relates essentially to a claim by the plaintiff of his 355,000 shares ('the said shares') in the defendant company which he alleged had been transferred to his father through the forgery of the share transfer form dated 24 August 1998 (exh D4).

After a full hearing the learned judge made the following orders:

(a) the plaintiff was declared the shareholder of the said shares in the defendant company;
(b) the purported transfer of the said shares in D4 be cancelled;
(c) the plaintiff was allowed to claim all dividends he was entitled to since 24 August 1993;
(d) costs to the plaintiff.

However, in respect of the other claims of the plaintiff, the learned judge made the following orders:

(i) the defendant company had properly and lawfully removed the plaintiff as a director at the company's extraordinary general meeting held on 10 June 1993;
(ii) there was no need to appoint M/s Ernst & Young, an accounting firm, as the receivers and managers for the purpose of managing the daily business of the defendant company;
(iii) mareva injunction order was disallowed;
(iv) damages for forgery was also disallowed.

The defendant company filed an appeal to this court against orders (a), (b) and (c) made by the learned judge. The plaintiff filed a cross-appeal against

orders (i), (ii), (iii) and (iv) set out above. For the purpose of this judgment we will refer the parties as the plaintiff and the defendant company.

Preliminary

At the outset of the hearing of this appeal, counsel for the defendant company intimated that the appeal record was not complete as the chemist report was not included therein. By consent of the parties, it was agreed that the chemist report be included as part of the appeal record and accordingly marked as pp 810, 811 and 812 in Jilid 2, Bahagian C.

In addition thereto, the defendant company filed a notice of motion for leave to file a supplementary memorandum of appeal. Counsel for the plaintiff objected. After hearing counsel for both parties, we granted leave to the defendant company to file the supplementary memorandum of appeal as exhibited to the affidavit of Lim Hoi Siok, its director (exh 'LHS-I').We also ordered that the costs of the application be paid to the plaintiff in any event.

Brief background

The defendant company is a second hand car dealer family company with branches throughout Perak and was founded by the plaintiff's father, Lim Chin Seng @ Lim Sitt Min @ Lim Tai Ming who had a number of 'wives'. The plaintiff (PW1) and his brother, Lim Tuck Cheong (PW2) are brothers and have the same mother whilst Lim Hoi Siok (DW1) is the half-brother of the plaintiff and PW2 and is the offspring of the first wife. The plaintiff's father, Lim Chin Seng @ Lim Sitt Min @ Lim Tai Ming died on 28 February 1994.

It is not disputed that the plaintiff held the said shares in the defendant company and that he was a director of the defendant company before the alleged transfer of the said shares and his removal as a director thereof.

The purported transfer of the said shares from the plaintiff to his father was approved by the defendant company vide a circular resolution 12/93 dated 24 August 1993 (P2). All the directors of the defendant company including the plaintiff's father and PW2 signed the resolution.

The plaintiff was removed as a director of the defendant company following a notice (D17) of an extraordinary general meeting which was held on 10 June 1993, a directors' circular resolution (P4) and confirmed by the minutes of the extraordinary general meeting (D20). The plaintiff himself did not attend the extraordinary general meeting as he was overseas as is evidenced from the attendance list (see p 373 of the appeal record). His full brother, PW2, did attend the said meeting. The removal of the plaintiff as a director of the defendant company was initiated by the plaintiff's father by letter dated 3 May 1993 (D10) to the company secretary.

The issues

Three substantive issues were identified by the learned judge for his determination, viz:

(1) whether the plaintiff did or did not sign the share transfer form (D4) in favour of his father;

(2) whether the plaintiff was properly removed as a director; and

(3) whether the assets of the defendant company were being dissipated and hence the prayer for an injunction restraining the defendant company from selling/transferring its assets and the appointment of a receiver and manager.

Issue (1)

The learned judge found this issue in favour of the plaintiff when he held that the plaintiff did not sign D4 in favour of his father and D4 was a forgery. Consequently he declared the plaintiff as the shareholder of the said shares in the defendant company. Hence the appeal by the defendant company against the order of the learned judge.

Before proceeding to consider the evidence presented in respect of this issue, counsel for both parties submitted before us on the issue of standard of proof in cases of forgery.

The learned judge held that the standard of proof that fell on the plaintiff to satisfy the court that his purported signature in D4 was forged would be on a balance of probabilities. His Lordship relied on the passage of the judgment of this court in *Boonsom Boonyanit @ Sun Yok Eng v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62 at p 75:

> The proof of forgery in civil proceedings, unlike fraud, comes within the general rule earlier adverted to. That it need only be established on a balance of probabilities was laid down as long ago as 1855 by the Privy Council in *Doe D Devine v Wilson* (1855) 14 ER 581, where Sir John Patteson, when delivering the advice of the Board said (at p 592):
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> > 'Now, there is a great distinction between a civil and a criminal case, when a question of forgery arises. In a civil case the onus of proving the genuineness of a deed is cast upon the party who produces it, and asserts its validity. If there be conflicting evidence as to the genuineness, either by reason of alleged forgery, or otherwise, the party asserting the deed must satisfy the jury that it is genuine. The jury must weigh the conflicting evidence, consider all the probabilities of the case, not excluding the ordinary presumption of innocence, and must determine the question according to the balance of those probabilities. In a criminal case the onus of proving the forgery is cast on the prosecutor who asserts it, and unless he can satisfy the jury that the instrument is forged to the exclusion of reasonable doubt, the prisoner must be acquitted.'

Further, independently of the advice of the board in *Doe D Devine v Wilson,* our apex court in *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182 also considered the standard of proof in connection with the issue of forgery where at p 188 Anuar J (as he then was) said:

> Another important matter has been raised by the appellant in connection with the issue of forgery. It was argued for the appellant both in the court below and before us that the standard of proof required in cases such as this should be beyond a reasonable doubt and *Syarikat Perkapalan Timor v United*

Malayan Banking Corp Bhd [1982] 2 MLJ 193 was cited in support. We have examined this decision with some care but we are unable to agree with the appellant's counsel that it is authority for the proposition that is put forward for the appellant. In our judgment, a customer who alleges that his banker honoured forged cheques drawn on his account need only establish the charge of forgery on a balance of probabilities and in this respect, we agree with the statement of the law by Gunn Chit Tuan J (as he then was) in *Syarikat Islamiyah v Bank Bumiputra (M) Bhd* [1988] 3 MLJ 218 where at p 220 the learned judge said:

> 'In this case although it would appear that there was no or insufficient evidence to prove beyond reasonable doubt for purposes of criminal proceedings that the signatures on the cheques concerned were forged by the said Awang Alias Che Mah bin Che Lob, yet I was satisfied that there was evidence adduced to prove on a balance of probabilities in this case that the signatures on the cheques were not those of the plaintiff's but were forged or placed thereon without the plaintiffs' authority and were therefore wholly inoperative.'

We are therefore of the opinion that the learned judge did not misdirect himself on the measure of proof that is required to bring home a case of forgery on the facts of such a case as the one before us.

Counsel for the defendant company brought to our attention the Federal Court case of *Ang Hiok Seng v Yim Yut Kiu* [1997] 2 MLJ 45 to support his contention that the standard of proof is beyond reasonable doubt. We wish to point out that *Ang's* case relate to the burden of proof in regard to allegation of fraud. In fact the Federal Court in *Ang*'s case quoted with approval the statement of law in *United Asian Bank Bhd*'s case when it quoted the relevant passage of that case at p 59 thereof. *Ang*'s case did not express any disagreement with the statement of law stated therein.

We are therefore of the opinion that the learned judge did not misdirect himself on the standard of proof in relation to the alleged forgery of D4 on the facts of the case before him. What the plaintiff needed to show is that the signature alleged to be his in D4 is not, on a balance of probabilities, his signature.

The next issue for consideration is whether we, the appellate court, should interfere with the findings of fact of the learned judge. In this respect, we are always guided by our duty and function as an appellate court. This court in *Boonsom's* case (at p 81) in reminding itself of the task entrusted to an appellate court quoted with approval of what was said by Lord Pearce in his dissent in *Onassis & Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403 at p 430:

> The function of a Court of Appeal is to set aside a judgment that should not be allowed to stand because it occasions a substantial wrong or a miscarriage of justice. That wrong or miscarriage of justice may consist of a judgment in favour of the wrong party. It may also consist of a failure in the judicial process to which both parties are entitled as of right, namely, the weighing of their respective cases and contentions. Such failure may constitute a wrong or miscarriage of justice even though it may appear that the appellant may in the end fail to secure a judgment in his favour. But the fact that the right party seems to have succeeded in the court below will naturally make a Court of

> Appeal extremely reluctant to interfere, and it would only do so in the rarest cases. Such matters are questions of degree.

It then turns on the judicial appreciation of the evidence by the learned judge court for our consideration. This court in *Boonsom's* case had this to say at p 77:

> It is trite that, apart from applying the standard of proof required by law, a trier of fact, in order to arrive at a decision according to law, must judicially appreciate the evidence led before him upon the issue called for resolution. A decision arrived in the absence of a judicial appreciation of evidence is liable to appellate correction. Judicial appreciation is concerned with the process of evaluating the evidence for the purpose of discovering where the truth lies in a particular case. It includes, but is not limited to, identifying the nature and quality of the evidence, assigning such weight to it as the trier of fact deems appropriate, testing the credibility of oral evidence against contemporaneous documents as well as the probabilities of the case and assessing the demeanour of witnesses.

The defendant company, as the appellant before us, attacked the findings of the learned judge on a number of grounds.

We will first deal with the critical issue of the evidence of the document examiner (PW3). The learned judge relied substantially on her evidence in relation to his finding that D4 was forged. Counsel for the defendant company took issues on C1 and P20. In respect of C1 he submitted that neither the court below nor the defendant company had the benefit of visually inspecting the samples used for comparison with D4. It was further submitted that the documents said to be used for comparison with D4 had not been admitted or proved to be that of the plaintiff. We would say that these matters are non issues as it would appear from the records that no objection was taken in the court below and C1 and P20 are admitted documents for which the learned judge would be entitled to go by the contents of those documents.

However, the important issue is whether the learned judge was right in ruling:

> … since P20 is an opinion not based on the analysis of plaintiff's purported signatures on D4 and as such, was irrelevant to the issue at hand which was the determination of whether D4 was in fact executed by the plaintiff. The fact that P20 was also a document made by PW3, did not in itself make that report a relevant document for the consideration of the court. The authenticity of the plaintiff's signature in D4 (as opined by PW3 in P20) was never a fact in issue, nor was it a fact necessary to explain a fact in issue. In accepting PW3's opinion on the signatures found in D4, the court was only concerned with her opinion on that fact itself and should not, in my considered view, concern itself with her (PW3) opinion on other irrelevant documents. Thus, the court had ignored PW3's opinion in P20.

P20 was put in initially at the behest of the plaintiff though withdrawn later in the proceedings in spite of the objection of counsel for the defendant company. The learned judge admitted that counsel for both parties were supposed to submit on this point but it was overlooked by both parties. The

learned judge then took upon himself by agreeing with the plaintiff's counsel that P20 is an opinion not based on the analysis of the plaintiffs purported signatures on D4 and hence ruled that it was irrelevant to the issue at hand which was the determination of whether D4 was in fact executed by the plaintiff.

In our view, the learned judge might well be right but the issue is really centred on the credibility of PW3. In other words, it goes to show whether her opinion could be relied on or accepted by the court, that is, the weight to be given to her evidence in regard to C1.

Section 45 of the Evidence Act 1950 (under the caption 'Opinions of experts') allows for the reception of expert evidence to enable the court to form an opinion. In this case, the court is fully entitled to receive the opinion evidence of PW3 in the form of C1 and P20 as both were in respect of the signature of the plaintiff. However, under s 46 of the Evidence Act 1950, P20 is admissible and relevant evidence as it is 'inconsistent' with the opinion of the expert (PW3) given in the form of C1. Section 46 reads:

> Facts not otherwise relevant are relevant if they support or are inconsistent with the opinions of experts when such opinions are relevant.

It is not disputed that the signature of the plaintiff in the sale and purchase document (P14) was compared with the signatures of the plaintiff found in Bank Simpanan Nasional passbook (P15) and four credit cards (P16 to P19) and yet PW 3 could not form the opinion that the signature in P14 and those found in P15 to P19 are of the same authorship (see p 431 of the appeal record).

The learned judge should have heard counsel on this issue. If he had the benefit of the counsel's submission, (as we did) then he could see the relevance of P20 vis-a-vis s 46 of the Evidence Act 1950. If he had done so his reception and evaluation of the opinion of PW3 would have been different. In the circumstances we are of the opinion that the learned judge erred in ruling that P20 was not a relevant document when it is relevant to show the weight to be given to PW3's expert opinion. Further, it is said that evidence by handwriting expert can never be conclusive because it is only opinion evidence (*PP v Mohamed Kassim bin Yatim* [1977] 1 MLJ 64 at p 66).

Minus the evidence of PW3, what other evidence was relied on by the plaintiff to show that D4 was forged? The learned judge quite apart from the evidence by PW3 (whose opinion, we say, should not be given much weight for the reasons stated earlier on), accepted the denial of the plaintiff that the signature on D4 was not his and was forged but by whom it was not ascertained. The following circumstances were stated by the learned judge to lend support to his finding that the plaintiff did not sign on D4:

(i) D4 was not dated although according to DW1, he witnessed its execution in early 1993. D4 was an important document and yet it was not dated and no record of its execution date was kept by the defendant company.

(ii) The plaintiff discovered the forgery only upon his return to Malaysia on 18 February 1994 when he was informed by PW2. He was surprised. This reaction was noticed by PW2 and also not denied by DW2.

(iii) The plaintiff approached DW1 on the matter and was offered RM200,000 in settlement. He asked for RM300,000 but was refused. According to PW2, the defendant company agreed to pay RM300,000 when the plaintiff filed this action but by then the plaintiff refused. This testimony was never challenged by the defendant company. Hence an inference can be drawn that there was the offer of RM300,000 as settlement for the transferred shares.

(iv) PW2 explained that the circular resolution confirming the share transfer from the plaintiff to his late father was made without any meeting to discuss the matter. According to PW2, he signed P2 as it was handed over for his signature by his father (also plaintiff's father). PW2 obediently complied. The learned judge accepted the explanation as the defendant company was run by the plaintiffs father in an autocratic manner and as this was a family company no one questioned the father's wishes. The company secretary (DW2) confirmed things were done informally in the defendant company. Hence, P2 did not, per se, make the share transfer unimpeachable.

(v) D4 was stamped only on 24 August 1993, ie some months after it was signed. Why did the father sign as transferee only on 19 August 1993?

(vi) Even though DW1 gave evidence that he saw the plaintiff sign D4 in the presence of his father, there was no discussion and no explanation on that transaction in which the court found to be quite unbelievable.

The above are what the learned judge described as suspicious circumstances which compel him to a finding that the plaintiff did not sign on D4, quite apart from his reliance on the opinion of PW3.

The defendant company's counsel submitted that such findings are contrary to the evidence and are not supported. In other words, such findings by the learned judge were made in the absence or lack of judicial appreciation of the evidence before him.

On the issue that D4 was not dated when it was signed and no record of its execution date kept by the defendant company, counsel for the defendant company submitted that this does not mean that the transfer form (D4) is invalid — (*Robert Tan & Ors v Tommy Tan & Anor* [1984] 1 MLJ 230 at p 233). The issue of the execution date is a matter entirely between the transferor and the transferee and in so far as the defendant company is concerned, the record will only show when the transfer document was presented and DW1 and DW2 had given evidence on this issue (see p 243 para C and p 286 para C of the appeal record, Vol 1).

There is also the evidence of the plaintiff's reaction when he learnt of the transfer of his shares upon his return from Japan. The fact that he was surprised upon learning of it does not tally with his evidence that he was in

communication with his brothers and inquired about the defendant company and yet PW2 did not inform him about the transfer when PW2 was a signatory to the resolution (P2) and therefore knew of the transfer of the said shares. The learned judge should have considered whether the plaintiff's claim that he was not informed of the transfer of the said shares is plausible or not. The transfer of the said shares is very crucial and could not possibly escape PW2's mind in his communication with the plaintiff relating to the affairs of the defendant company.

On the issue of the RM300,000 offered as settlement, this was denied by DW 1 who testified that the amount was offered to the plaintiff not for the purpose of the settlement of the said shares but for him to settle his debts of RM238,000 which was acknowledged by the plaintiff (see p 246 para B of appeal record, Vol 1). The learned judge found that the offer for settlement went unchallenged but we say that this finding is wrong as there is evidence that the offer was challenged (see p 138 para A–B; p 246 para D–E and pp 263–264 of appeal record, Vol 1).

As the learned judge found that the plaintiff's father ran the defendant company, a family company, in an autocratic manner, this lends support that the plaintiff dared not question his father when asked that the plaintiff's shares be transferred to him. PW2 himself said that he obediently signed P2 when it was handed to him for his signature. There was the further evidence that the other brother of the plaintiff ie Lim Teik Huat (PW7) gave up his shares willingly to his father and resigned as a director (see p 186 and pp 231–232 of appeal record, Vol 1). There was therefore credence to the evidence of DW1 that he brought D4 to the plaintiff who signed it in the presence of his father. DW1 was in no position to say whether there was a discussion or not on the transfer as when he handed D4 the plaintiff was already with his father. The question of whether there should have been discussion of the transfer of the said shares is merely speculative on the part of the learned judge given his own finding that the defendant company was run in an autocratic manner and it is unlikely that the plaintiff dared to challenge his father's directive.

The other telling evidence which should have triggered the learned judge's mind would be why it took the plaintiff a few months after the death of his father to lodge a police report alleging forgery. It would show more probable than not that having failed to obtain the monies to settle his debts which he acknowledged, he decided to put pressure on his half brothers by lodging the police report alleging forgery. The plaintiff knew fully that with the death of his father, the only evidence left in respect of the alleged forgery would be the evidence of DW1 and the denial of his signature on D4. Had his father been alive, he would not dare bring this action for fear of his father and further the evidence of his late father would certainly be against him. The learned judge, with respect, failed to adequately consider this piece of evidence.

The learned judge seemed to contradict himself as to the credibility of PW2. When considering issue (3), this is what he said of PW2 (p 18 of his judgment):

> This information was a view of a person (PW2) who was in a position to express a biased view to assist the plaintiff, his full brother and as such had to be given little or no worthy weight by the court.

Equally, the evidence of PW2 in respect of issue (1), that is, forgery, should be viewed with caution by the learned judge. However, he seemed to give much weight to the evidence of PW2. This would amount to treating PW2 as a split personality. With respect, it would be appropriate to recall the words of Spenser-Wilkinson J in *Goh Ah Yew v PP* [1949] MLJ 150 at p 153 wherein he held:

> A witness cannot be regarded as a split personality who is worthy of credit at one moment and unworthy of credit at the next.

We have carefully considered the written submissions of counsel for both parties and we are inclined to accept the submission of counsel for the defendant company. The learned judge failed to properly evaluate the opinion of PW3 as an expert witness regarding the alleged forgery for the reasons that we have stated. The learned judge drew a number of inferences to show suspicious circumstances of the execution of D4 without fully appreciating all the evidence before him. We would go so far as to say that the suspicious circumstances of the allegation of forgery are more against the plaintiff than the defendant company and the learned judge failed to adequately give due weight and consideration to them when ruling that the plaintiff had on a balance of probabilities proved the forgery of D4.

We are well aware of the limited circumstances in which it is open to an appellate court to interfere with the findings of a trial judge based on the credibility of the witnesses who have given evidence at the trial. However, we are entitled to do so 'when a learned judge has so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial and, in reaching his conclusion, has not properly analyzed the entirety of the evidence which was given before him, it is the plain duty of an appellate court to intervene and correct the error otherwise that error result in serious injustice': per Lord Roskill in *Choo Kok Beng v Choo Kok Hoe & Ors* [1984] 2 MLJ 165 at p 169.

Before concluding on this issue, we would for completeness touch on the procedural issue raised by the defendant company before the learned judge and unfortunately not considered by him. The procedural issue is this. The defendant company contended that the estate of the plaintiffs father should have been made a party to the action as the dispute concering the said shares is one between the plaintiff and his late father and the defendant company has nothing to do with it. It merely carries out its duty of registering of the transfer of the shares between its members. We agree that the order made by the learned judge would certainly affect the estate of the plaintiff's father without it being heard. However, it is open to the executors or administrators of the estate of the plaintiffs father to apply to be joined as defendants, which they certainly could have done (see *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697 at p 724). As observed by Edgar Joseph Jr SCJ, in *Dewan Undangan Negeri Kelantan* at p 724:

> A denial of the opportunity of being heard is a wrong which is personal to the party aggrieved. If therefore such a party does not complain, it is not the affairs of others to complain.

In our view, it is certainly not for the defendant company to raise this procedural issue but for the executors or administrators of the estate of the plaintiff's father to take the necessary steps to be joined as defendants as they certainly were well aware of the present action.

In this context, Viscount Radcliffe, speaking for the Privy Council in *Ikebife Ibeneweka & Ors v Peter Egbuna & Anor* [1964] 1 WLR 219 aptly put at p 226:

> ... there has never been any unqualified rule of practice that forbids the making of a declaration even when some of the persons interested in the subject of the declaration are not before the court ... Where, as here, defendants have decided to make themselves, the champions of the rights of those not represented and have fought the case on that basis, and where, as here, the trial judge takes the view that the interested parties not represented are in reality fighting the suit, so to say, from behind the hedge, there is, in their Lordships' opinion, no principle of law which disentitles the same judge from disposing of the case by making a declaration of title in the plaintiffs' favour.

Though the learned judge did not consider this procedural issue but from the pleadings and the notes of the proceedings, it is, in our view, clear that the defendant company was, in reality, fighting the action on behalf of the estate of the plaintiff's father. As Viscount Radcliffe aptly put 'in reality fighting the suit, so to say, from behind the hedge'.

It is therefore a non issue and that could possibly be the reason the learned judge did not deem it fit to consider this procedural issue.

We are in the circumstances satisfied that the defendant company should succeed on this issue. That disposes of the appeal by the defendant company.

We next have to consider the second and third issues which really come under the cross-appeal by the plaintiff.

Issue (2)

The power to remove a director of the defendant company is provided by art 94 of its Articles of Association. Article 94 reads:

> The company may by Ordinary Resolution of which special notice has been given remove any Director before the expiration of his period of office, notwithstanding any provision of the Articles or of any agreement between the company and such Director, but without prejudice to any claim he may have for damages for breach of any such agreement.

The following steps were taken in compliance with art 94.

The plaintiff's father, a shareholder of the defendant company, gave a special notice dated 3 May 1993 to the secretary of the defendant company (see p 369 of the appeal record, Vol 1) pursuant to art 94 of the aticles of association of the defendant company and s 125(2) of the Companies Act

1965 proposing a resolution for the removal of the plaintiff as a director at an extraordinary general meeting of the defendant company to be convened.

Pursuant to the receipt of the notice aforementioned, the defendant company's secretary wrote to the plaintiff on 7 May 1993 at Lot 45885, Jalan Kampar, Ipoh noticing the plaintiff of his father's intention to remove him as a director. A copy of the notice was enclosed therein for his attention (see p 370 of the appeal record, Vol 1).

On 25 May 1993, the Board of Directors in a circular resolution signed by all the directors except the plaintiff (recorded as being overseas) resolved that the plaintiff be removed as a director (see p 371 of the appeal record, Vol 1). On 25 May 1993 itself a notice of the extraordinary general meeting to be held on 10 June 1993 was given by the company secretary to consider and pass an ordinary resolution for the removal of the plaintiff as a director (see p 372 of the appeal record, Vol 1). On 10 June 1993, at the extraordinary general meeting held at its registered office, No 21 & 23 Jalan Hussein (Ground Floor), 30230 Ipoh, the ordinary resolution to remove the plaintiff as a director was passed (see p 374 of the appeal record, Vol 1). All the directors, except the plaintiff attended the extraordinary general meeting as evidenced by the attendance list (see p 373 of the appeal record, Vol 1). In the attendance list it was duly noted against the plaintiff's name that he was overseas.

The only issue raised by the plaintiff for his wrongful removal as a director was that he did not receive the relevant notices allegedly sent by the defendant company's secretary to him at Lot 45885, Jalan Kampar 30250 Ipoh. Therefore he claimed that his removal as a director was not valid and ineffective and sought a declaration from the court that he was and still is a director of the defendant company. According to the plaintiff the notice should not be sent to Lot 45885, Jalan Kampar, 30250 Ipoh as it was not his correspondence address. However, we note at p 804 of the appeal record, Vol 1 under the Register of Members, his address is stated as Lot 45885, Jalan Kampar, 30250 Ipoh. According to DW 2, the defendant company's secretary, all correspondence to the plaintiff had been sent to that address.

The learned judge accepted the evidence of DW 2 that this address was the same in all previous correspondence to the plaintiff from 1984 to1993 and that the plaintiff had never complained about this before. In the event the learned judge rejected the plaintiff's contention that he had not received the relevant notices.

We accept the learned judge's finding of fact and see no reason to disagree with him. Accordingly the plaintiff failed on this issue.

Issue (3)

In view of our decision that D4 was not forged and therefore the transfer of the said shares to his father was valid it follows therefore that the plaintiff was no longer a shareholder of the defendant company at the time this

A action was filed by him. The learned judge also held that the plaintiff was validly removed as a director of the defendant company and we agree with him. In view of his change of status as being neither a shareholder nor a director, it follows therefore that he has no locus standi to seek the appointment of a receiver and manager for the defendant company and for an order of a mareva injunction.

B In that event it would not be necessary for us to consider the grounds relied on by the plaintiff for issue (3).

We would affirm the orders made by the learned judge without having to consider the merits which the learned judge had done in the court below. In view of the orders he made, we agree with the submission of counsel for C the defendant company that the learned judge erred in not making an ancillary order for damages between the interim period that the ex parte order dated 24 August 1994 was given to the plaintiff for the appointment of a receiver and manager and for a mareva injunction order up to the disposal of the suit. There was an undertaking as to damages by the plaintiff at the time of the application for the ex parte order that was obtained on D 24 August 1994.

For the reasons stated, we would make the following orders.

In respect of the appeal by the defendant company, we allow it with costs. The orders of the learned judge are set aside and we rule that the transfer of the said shares of the plaintiff to his father was valid. We order E that the deposit be refunded to the defendant company.

In respect of the cross-appeal by the plaintiff, we dismiss it with costs and we affirm the decision of the learned judge. We also make an ancillary order that the defendant company is entitled to damages for the interim period of the order dated 24 August 1994 obtained by the plaintiff against F the defendant company and such damages are to be assessed by the senior assistant registrar on a date to be fixed.

Order accordingly.

Reported by Jafisah Jaafar

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